American Express International Banking Corporation v Tan Loon Swan

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03-130-90
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND GUNN CHIT TUAN SCJJ
2 DECEMBER 1991

Civil Procedure *— Appeal — Summary judgment set aside — Claim on guarantee — Loan agreement governed by laws of Singapore — Jurisdiction of court over matter — Service of letter of demand on respondent — Non-stamping of guarantee document — Appellant's change of name — Whether triable issues raised — Stamp Ordinance 1949 ss 43, 47, 51 & 52(1) — Evidence Act 1950 s 45 — Rules of the High Court 1980 O 14*

Civil Procedure *— Summary judgment — Appeal — Summary judgment set aside — Claim on guarantee — Loan agreement governed by laws of Singapore — Jurisdiction of court over matter — Service of letter of demand on respondent — Non-stamping of guarantee document — Appellant's change of name — Whether triable issues raised — Stamp Ordinance 1949 ss 43, 47, 51 & 52(1) — Evidence Act 1950 s 45 — Rules of the High Court 1980 0 14*

The appellant, a Singapore-based bank, had granted facilities to a Singapore-registered company. The facilities were secured by a guarantee given by two persons, including the respondent. The said guarantee was executed by the respondent and contained a maximum liability clause for S$10.5m together with interest at 12%pa from the date of demand to the date of payment. Pursuant to a default by the Singapore company in its repayment obligations, the appellant notified the Singapore company and the respondent and demanded payment of the loan amount plus interest. The appellant subsequently filed a claim against the respondent claiming the sum due and applied for summary judgment. The senior assistant registrar of the High Court, Kuala Lumpur, ordered that the appellant be at liberty to enter final judgment in the action against the respondent for the sum of S$10.5m with interest. On appeal to the judge-in-chambers, the order of the senior assistant registrar was set aside and unconditional leave given to the respondent to defend the action. The learned judge considered that there were triable issues, namely: (a) there was no evidence that the letter of demand had been served on the respondent; (b) that the guarantee document was not stamped and therefore not admissible; and (c) uncertainty about the status of the appellant. The appellant appealed.

Held, allowing the appeal:

(1) On the preliminary objection that the courts in Malaysia have no jurisdiction over the matter as it was stated in the general loan and collateral agreement that the agreement was to be construed according to the laws of Singapore, in this case the respondent had clearly submitted to the jurisdiction of the Malaysian courts

by entering his appearance and filing his defence to the action and in any case there was no reason why a court in this country where the respondent resides is not the forum conveniens. Even if it was necessary for a court in this country to form an opinion on a point of foreign law, s 45 of the Evidence Act 1950 can be applied.

(2) On the facts the letter of demand was duly sent to the respondent in accordance with the terms of the guarantee and further, there was no evidence of any denial of the receipt of the letter of demand in the affidavit in reply filed by the respondent.

(3) Although the guarantee document had not been stamped, the non-stamping of the document did not provide a triable issue. The court has power and the responsibility to impound unstamped documents, if produced, and to admit them on payment of stamp duty or penalty, if any, under proviso (a) to s 52(1) of the Stamp Ordinance 1949.

(4) The appellant had applied and obtained an order amending its name. The respondent had not appealed against the order of the judge and the time for appeal had lapsed. There was not therefore a triable issue in respect of the plaintiff's change of name.

(5) Having heard the submissions of counsel on the appeal, the court did not consider that in the particular circumstances of this case there were any triable issues.

[Bahasa Malaysia summary

Perayu, sebuah bank yang pusat operasinya di Singapura, telah memberi kemudahan kewangan kepada sebuah syarikat yang didaftar di Singapura. Kemudahan-kemudahan itu telah dijamin oleh jaminan yang diberi oleh dua orang, termasuk responden. Jaminan itu telah disempurnakan oleh responden dan mengandungi fasal mengenai liabiliti maksimum sebanyak S$10.5 juta berserta bunga pada kadar faedah 12% setahun dari tarikh hutang itu dituntut hingga tarikh ia dibayar. Berikutan dengan keingkaran syarikat Singapura itu membayar balik hutangnya perayu telah memberitahu syarikat Singapura itu dan responden dan menuntut pembayaran hutang berserta bunga itu. Perayu kemudiannya memfailkan tuntutan terhadap responden menuntut jumlah wang yang kena dibayar dan memohon mendapat penghakiman terus. Penolong kanan pendaftar di Mahkamah Tinggi, Kuala Lumpur telah memerintahkan bahawa perayu diberi kebebasan untuk mencatat penghakiman muktamad di dalam tindakan itu terhadap responden bagi jumlah wang S$10.5 juta berserta bunga. Apabila rayuan telah dibuat kepada hakim dalam kamar, perintah penolong kanan pendaftar itu telah diketepikan dan kebenaran tanpa syarat telah diberi kepada responden untuk membela tindakan itu. Hakim yang arif berpendapat bahawa terdapat isu-isu yang boleh dibicarakan, iaitu: (a) tidak terdapat keterangan bahawa surat tuntutan itu telah disampaikan kepada responden; (b) dokumen jaminan itu tidak ditera setem pembayaran duti dan oleh kerana itu tidak boleh diterima; dan (c) ketidakpastian mengenai status perayu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Tentang bantahan permulaan bahawa mahkamah di Malaysia tidak mempunyai bidang kuasa ke atas perkara itu oleh kerana telah disebut di dalam perjanjian hutang am dan kolateral bahawa perjanjian itu hendaklah ditafsirkan mengikut undang-undang Singapura, di dalam kes ini responden dengan jelas telah menyerah dirinya kepada bidang kuasa mahkamah di Malaysia dengan memasukkan kehadirannya dan memfailkan pembelaannya dalam tindakan ini dan dalam apa keadaan sekali pun tidak ada sebab mengapa mahkamah di negeri ini di mana responden bermastautin tidak boleh menjadi forum yang sesuai. Walaupun mahkamah di negeri ini perlu memberi pendapat atas perkara undang-undang asing, s 45 Akta Keterangan 1950 boleh digunakan.

(2) Atas fakta di dalam kes ini surat tuntutan itu telah disampaikan dengan sempurna kepada responden mengikut terma jaminan tersebut dan tidak ada keterangan mengenai apa-apa penafian penerimaan surat tuntutan itu di dalam afidavit jawapan yang difailkan oleh responden.

(3) Sungguhpun dokumen jaminan itu tidak ditera setem pembayaran duti, perkara itu tidak menimbulkan isu yang boleh dibicarakan. Mahkamah berkuasa dan berkewajipan mengimpaun dokumen yang tidak ditera itu jika dikemukakan, dan menerimanya selepas duti setem atau penalti, jika ada, dibayar di bawah proviso (a) kepada s 52(1) Ordinan Setem 1949.

(4) Perayu telah memohon dan mendapat perintah meminda nama beliau. Responden tidak merayu terhadap perintah hakim itu dan masa untuk membuat rayuan telah luput. Oleh kerana itu, tidak terdapat isu yang boleh dibicarakan berkenaan dengan pertukaran nama plaintif.

(5) Selepas mendengar penghujahan dari peguam-peguam dalam rayuan ini, mahkamah berpendapat bahawa dalam keadaan tertentu kes ini, tidak terdapat apa-apa isu yang boleh dibicarakan.]

Note

For cases on appeal from summary judgments, see 2 *Mallal's Digest* (4th Ed) paras 2187–2191.

Cases referred to

1 *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239 (refd)

2 *William Jacks Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 (refd)

3 *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198 (folld)

4 *Elders Keep Ltd (formerly known as Keep Brothers Ltd) v Luen Mei Plastic Industries Sdn Bhd & Ors* [1989] 2 CLJ 1005 (folld)

5 *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 (refd)

6 *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1986] 1 MLJ 426 (refd)

Legislation referred to
Evidence Act 1950 s 45
Stamp Ordinance 1949 ss 43, 47, 51, 52(1)
Rules of the High Court 1980 O 14

Appeal from: Notice of appeal to judge-in-chambers in Suit No C23–403–86 (High Court, Kuala Lumpur)

K Anantham (*Skrine & Co*) for the appellant.
Yaw Chun Soon (*Choong Yik Son & Fiona Ghaus*) for the respondent.

Gunn Chit Tuan SCJ (delivering the judgment of the court): The American Express International Banking Corporation (hereinafter referred to as 'the plaintiff') is a Singapore-based bank. In 1985, it granted facilities to a Singapore-registered company known as Cornwall Investments Pte Ltd. The facilities were secured by a guarantee given by two persons, including one Tan Loon Swan (hereinafter referred to as 'the defendant'). The said guarantee was executed by the defendant on 8 July 1985, and contained a maximum liability clause for S$10.5m together with interest at 12%pa from the date of demand to the date of payment (pp 57 and 63 of the appeal records).

The banking facilities enjoyed by Cornwall Investments Pte Ltd were also secured by a pledge of shares made by that company in favour of the plaintiff pursuant to the terms and conditions of a general loan and collateral agreement (pp 54 and 55 of the appeal records). On 23 December 1985, Cornwall Investments Pte Ltd and the defendant were notified by the plaintiff of a default by the former in complying with its repayment obligations and the need to meet a shortfall in the collateral value of the pledged shares. On the same day, the plaintiff also demanded payment of the loan amount together with accrued interest of S$293,990.67 (p 60 of the appeal records). Because Cornwall Investments Pte Ltd and the defendant defaulted in complying with the demand of 23 December 1985, the plaintiff caused a letter of demand to be addressed to the defendant through its solicitors on 2 January 1986 (p 61 of the appeal records).

On 23 February 1986, the plaintiff filed a claim against the defendant describing itself as the American Express International Banking Corporation. But on 11 September 1987, the plaintiff filed a notice correcting its name in the title to the action from American Express International Banking Corporation to American Express Bank Ltd (see supplementary appeal records).

Pursuant to the said default on the part of the defendant, the plaintiff sold some of the pledged shares on 3 June 1986, and recovered the sum of S$1,335,050 (p 76 of the appeal records). On 15 September 1987, the plaintiff filed an application for summary judgment in respect of its claim together with a supporting affidavit affirmed by one John Richard Williamson dated 14 September 1987 (pp 37 to 39 of the appeal records). In that affidavit, the said John Richard Williamson stated that to his own knowledge the amount due to the plaintiff as at 31 August 1987, was S$11,167,714.47. On 29 March 1989, the senior assistant registrar of the

A High Court at Kuala Lumpur ordered that the plaintiff be at liberty to sign final judgment in the action against the defendant for the sum of S$10.5m together with interest thereon at the rate of 12%pa from 2 January 1986 to date of payment and costs of the suit of $350. The defendant filed a notice of appeal to the judge-in-chambers on 30 March 1989, and before Annuar J raised eight issues as triable issues but only three of them found favour with the learned judge, namely:

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(a) that there was no evidence that the letter of demand had been served on the defendant;
(b) that the guarantee document was not stamped and therefore not admissible;
C (c) uncertainty about the status of the plaintiff.

On 11 December 1990, Annuar J ordered that the order of the senior assistant registrar dated 29 March 1989, be set aside and that the defendant be given unconditional leave to defend the action and also that the plaintiff do pay the defendant the cost of appeal.

D The plaintiff, being dissatisfied with the decision of the learned judge, filed a notice of appeal to this court on 24 December 1990. Before us, Mr Yaw, counsel for the defendant, raised two preliminary objections. Firstly he stated that the defendant had applied to the High Court on 12 April 1991, to strike out the plaintiff's statement of claim on the ground that the E solicitors, Messrs Skrine & Co, had no authority to act on behalf of the plaintiff. The application was originally fixed for hearing on 6 June 1991, but was adjourned a couple of times until 4 July 1991, when the relevant file could not be traced in the High Court. Counsel referred to *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd*[1] and contended that a challenge to the authority of solicitors may be made at any time. Mr Anantham, F counsel for the plaintiff, replied by pointing out that the plaintiff's suit was filed in 1986 and that judgment was obtained against the defendant in 1987 and contended that it was too late for the defendant to raise this issue in the Supreme Court in November 1991. We were informed by counsel for the defendant that he was aware of *William Jacks Co (M) Sdn Bhd v Chemquip* G *(M) Sdn Bhd & Anor*,[2] in which this court held, inter alia, that where there is no evidence that there is no action properly before the court, it could determine the issue of want of authority on an application by motion or summons which the defendant has in fact filed in this case. However, we considered that as the High Court has not heard that application which was not before us, this preliminary objection should be overruled.

H The second preliminary objection was that the courts in this country do not have jurisdiction because it is stated in cl 21 of the general loan and collateral agreement that the said agreement is to be construed according to and the rights of the parties are to be governed by the laws of Singapore. Mr Anantham, in reply pointed out that the appeal before us was not con- I cerned with the general loan and collateral agreement but with the guarantee signed by the defendant in which there is no clause to specify that it was to be construed according to the laws of Singapore. We, however, noted that after service of the writ of summons and statement of claim on the defendant, he took no steps to apply for leave to enter conditional appear-

ance with a view to striking out the claim on the ground that the courts in this country have no jurisdiction. Instead the defendant, having entered appearance, filed his defence in 1986, which was amended in 1987 and re-amended in 1988 (pp 18 to 22 of the appeal records). The defendant has clearly submitted to the jurisdiction of the courts in this country and in any case we see no reason why a court in this country where the defendant resides is not the forum conveniens, and even if it is necessary for a court in this country to form an opinion upon a point of foreign law, s 45 of the Evidence Act 1950 can be applied. The second preliminary objection by the defendant's counsel was therefore also overruled.

We now return to the three issues which the learned judge considered were triable. As regards service of the letter of demand, it is true that cl 1 of the guarantee provides that there must be a demand in writing made on the guarantor but it is also provided in cl 17 of the guarantee that any notice of demand shall be deemed to have been duly given to the guarantor by sending the same by post addressed to him at the address provided in the guarantee. The letter of demand appearing on p 61 of the appeal records was addressed to the defendant at the 20th Floor, Wisma Supreme, Jalan Punchak, Kuala Lumpur, which is the defendant's address stated in the guarantee. It is also provided in cl 20 of the guarantee that the defendant has waived any representation demand or other notice of any kind and there is no evidence of any denial of receipt of the letter of demand in the affidavit in reply filed by the defendant. We therefore with respect disagree with the learned judge that this was a triable issue.

As regards stamping of the documents concerned, Mr Yaw pointed out that the loan agreement had not been stamped in accordance with the Stamp Ordinance 1949 and was therefore not admissible to prove the loan to Cornwall Investments Pte Ltd. He contended that if the loan is not proved, the guarantor is not liable and pointed out that the guarantee itself signed by the defendant was also not stamped. Mr Anantham, on the other hand, pointed out that the issue was not raised by the defendant either in his statement of defence or in his affidavit in reply or before the senior assistant registrar. As it was raised for the first time before the learned judge in the High Court, an attempt was made to have the matter adjourned to stamp the guarantee but counsel's request was refused by the learned judge. It is the contention of the plaintiff that the court can grant judgment if that was the only issue with the condition that the judgment cannot be extracted unless the stamped guarantee is produced to the registrar of the court and the plaintiff was prepared to undertake the stamping of the guarantee.

We were referred to and agree with the decision of the Federal Court in *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors*,[3] in which the Federal Court held at p 200 that it was clear that under s 52(1) of the Stamp Ordinance 1949, except for certain types of instruments, prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under ss 43 and 47 of that Ordinance. We would also agree with the views of the Federal Court that it is the responsibility of the court under s 51 of that Ordinance to impound unstamped documents, if produced, and to admit them under proviso (a) to s 52(1) on payment of stamp

duty or penalty, if any. As regards the question whether the Bar Council in this country would consider any of its members as being unprofessional for raising a stamp objection, we also agree that this is a matter left to that body to decide. The court and counsel appearing before it as officers of the court are only under an obligation to draw the court's attention to its powers under ss 51 and 52(1) including its provisos. We therefore agreed with and approve the views of VC George J expressed in *Elders Keep Ltd (formerly known as Keep Brothers Ltd) v Luen Mei Plastic Industries Sdn Bhd & Ors*[4] at p 1008 that the non-stamping of documents concerned does not provide a triable issue.

As for the third issue, it has been pointed out that the name of the plaintiff has been changed on 11 July 1985, as shown in the supplementary appeal records and in any case the defendant has accepted the change of name of the plaintiff when he filed certain pleadings setting out the correct name of the plaintiff as shown in the documents exhibited in the said supplementary appeal records. The issue was only raised for the first time in the appeal before the judge of the High Court and the plaintiff has since applied and obtained an order from a judge of the High Court amending the name of the plaintiff to 'American Express Bank Ltd'. The defendant has not appealed against that order of the judge and the time for appeal has lapsed. We therefore agreed with Mr Anantham that that was not a triable issue.

Mr Yaw then referred to the decision of this court in *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors*,[5] in which this court, in a judgment delivered by Hashim Yeop A Sani CJ (Malaya), held that the approach to be taken by an appellate court in an O 14 appeal has been settled and that the appeal court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing. Mr Yaw then urged us to consider some other issues which did not find favour with the learned judge in the High Court. We then spent some time listening to the submissions of counsel on those issues but considered that only two of them merited consideration by us. Mr Yaw referred us to the affidavit affirmed by the said John Richard Williamson on 14 September 1987 (pp 37 to 39 of the appeal records) and pointed out that that person who had affirmed the affidavit has stated that he is an associate counsel in and employed by the plaintiff. Counsel then referred to para 4 of the affidavit affirmed by the defendant on 28 January 1988 (p 42 of the appeal records), in which he has stated that he was 'advised by his solicitors and verily believed that the deponents in the plaintiff's affidavits did not even disclose the sources and grounds for their beliefs in the correctness of their averments therein, thereby rendering them materially defective in substance and not merely in form and thus inadmissible as evidence for the proceedings herein'.

Counsel then referred to *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman*[6] and contended that the learned judge had erred in accepting the affidavit of the said John Richard Williamson as the deponent being an associate counsel in the employment of the plaintiff could not state that it was within his own knowledge that the said debt was incurred and was still due and owing. We, however, considered that because the said

John Richard Williamson was an in-house lawyer employed by the plaintiff and has affirmed the said affidavit, it was not for the court to speculate on whether he did in fact have personal knowledge of the said debt of the defendant. In any case, we noted that the said affidavit was affirmed in Singapore by him at G4/G5, Shing Kwan House, 4 Shenton Way, Singapore 0106, which is the address of the registered office of the plaintiff.

Counsel then referred to the letter of offer (pp 68 to 70 of the appeal records), wherein it was stated that the guarantee form should be signed by all the five directors named therein and pointed out that the said guarantee was only signed by two of the directors. He also stated that the interest charged was higher than that indicated in the said letter of offer but there was no evidence of variation of the rate of interest. On these points, we would refer to the circular resolution of Cornwall Investments Pte Ltd signed by their directors (pp 63 to 67 of the appeal records) and agree with Mr Anantham that it was only resolved that one Tan Koon Swan and the defendant were to jointly guarantee the banking facilities made by the plaintiff to Cornwall Investments Pte Ltd and that explains why only two of its directors signed the guarantee after the said letter of offer. We also note that interest at 12%pa was covered by the said resolution.

Having heard the submissions of counsel on the appeal, we, for reasons stated, do not consider that in the particular circumstances of this case there are any triable issues. We therefore allowed the appeal with costs here and below, set aside the order of the learned judge and restored the order of the senior assistant registrar dated 29 March 1989, which was, however, varied by us to the effect that the final judgment to be signed against the defendant should be for the sum of S$10.5m together with interest thereon at the rate of 8%pa from the date of the writ to the date of payment or its equivalent in Malaysian Ringgit on the date of payment. The order of this court is also not to be extracted until the guarantee document has been stamped to the satisfaction of the senior assistant registrar and the deposit should be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim